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No. 92-5129

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In The

Supreme Court of the United States

October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court For The State Of Louisiana

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether errors committed by the trial court in defining reasonable doubt contributed to the verdict obtained in petitioner's trial.

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RESPONDENT'S BRIEF ON THE MERITS

MAY IT PLEASE THE COURT:

The instant criminal case is before this Court on writ of certiorari to the Supreme Court of the State of Louisiana. For reasons stated below, the respondent, State of Louisiana, respectfully urges this Court to affirm the holding of the Louisiana Supreme Court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below:

Petitioner John L. Sullivan was convicted of first degree murder after a jury trial in the Criminal District Court for the Parish of Orleans, Louisiana, and sentenced to death. His trial began on May 26 and concluded on May 27, 1982. The jury charge on reasonable doubt given during the guilt phase of the trial was similar to that later held constitutionally deficient in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam).

On direct appeal the Supreme Court of Louisiana affirmed the conviction, holding that the instruction on reasonable doubt, though erroneous, was harmless error. *State v. Sullivan*, 596 So.2d 177 (La. 1992). The Louisiana court also found that petitioner's trial counsel was ineffective in the penalty stage of the trial, and vacated the sentence. The court remanded for a new sentencing hearing. Applications for rehearing by petitioner and respondent were denied on April 9, 1992. Petitioner timely sought review in this Court and on October 19, 1992 this Court granted petitioner's application for certiorari.

B. The Trial Facts:

A complete statement of the facts of the offense in this case is included in the opinion rendered by the Louisiana Supreme Court. *State v. Sullivan*, 596 So.2d 177 (La. 1992) (J.App. 11). Briefly, petitioner Sullivan was convicted of shooting to death a patron of a New Orleans bar during a robbery attempt. Sullivan was identified at

trial by the co-perpetrator of the robbery, Michael Hillhouse, as the trigger-man. A barmaid positively identified Hillhouse and Sullivan in court as the persons who had committed the armed robbery, and she testified that shortly after she heard the shotgun blast which killed the patron of the bar, she saw Sullivan holding a shotgun to a customer's head. *Id.* at 180 (J.App. 14). Only one shotgun was used during the robbery-murder.

Sullivan, after shooting the patron with a shotgun, brought the co-perpetrator to his girlfriend's apartment, where he left the shotgun, and clothing he wore during the robbery. The two perpetrators were arrested on a drinking spree a few hours later when police identified them from descriptions given by surviving patrons of the bar. At trial the barmaid identified a jacket taken from the girlfriend's apartment as the jacket worn by Sullivan at the time of the murder. *Id.* at 180 (J.App. 14).

A firearms identification expert at trial identified the shotgun found at the girlfriend's apartment as the one which fired the shot that killed the victim. Sullivan did not testify during the guilt phase of the trial. The Louisiana Supreme Court noted that "the testimony of Hillhouse [the co-perpetrator] fingering Sullivan as the leader and triggerman remains unrefuted, . . . ", and that in addition to the testimony of the barmaid [Stephanie Lowery],

> . . . "other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold [Sullivan's girlfriend]. It was to this

apartment that Sullivan had brought Hillhouse to meet his 'wife' the morning of the murder."

Id. at 186 (J.App. 27).

During the guilt phase of the trial, the court instructed the jury with regard to "reasonable doubt":

> "If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt*. It is such a doubt as a reasonable person would

> seriously entertain. It is a *serious doubt*, for which you could give good reason."
>
> (emphasis added)
> *Id.* at 185 (footnote 3) (J.App. 2-3)
> Trial transcript at 566-68

The jury found Sullivan guilty as charged of first-degree murder[1] and, after a penalty hearing, recommended the death penalty.

C. The Appeal to the Louisiana Supreme Court:

On appeal to the Louisiana Supreme Court Sullivan argued, *inter alia*, that the jury instructions on reasonable doubt violated the prohibition of *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). In *Cage* this Court found that the terms "grave" and "substantial" suggest a higher degree of doubt than that required by the reasonable doubt standard.[2] The Court in *Cage* concluded that when those terms were considered in reference to "moral," as opposed to "evidentiary" certainty, a reasonable juror could find guilt based upon proof below the standard required by the Due Process Clause.[3] On

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[1] First degree murder is "the killing of a human being: . . . [w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . . " La.Rev.Stat. 14:30(A)(1)

[2] *Cage v. Louisiana*, 111 S.Ct. 328, 329-30 (1990).

[3] *Id.*, 111 S.Ct. at 330. The Court based its holding on *In re Winship*, 397 U.S. 358 (1970). In *Winship*, the Court held that the Due Process Clause requires that an accused not be convicted "except upon proof beyond a reasonable doubt of every fact

remand, the Louisiana Supreme Court in *State v. Cage* held that an erroneous reasonable doubt instruction is a trial error subject to harmless error analysis and that the instruction in that case was harmless beyond a reasonable doubt. *State v. Cage*, 583 So.2d 1125 (La. 1991), *cert. denied*, 112 S.Ct. 211 (1991).

The State agreed with petitioner that the jury charge was similar to the charge given in *Cage*. Both charges were standard, stock "reasonable doubt" jury charges included in Louisiana judges' bench books, which have been given to juries in Louisiana for as long as Louisiana lawyers can remember.[4]

The Louisiana Supreme Court concluded that the jury charge in Sullivan's trial was erroneous, but concluded that the instruction did not contribute to the jury's finding of guilt, citing *State v. Cage*, *supra*. *State v. Sullivan*,

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necessary to constitute the crime with which he is charged." *Id.* at 364.

[4] The erroneous *Cage* jury instruction regarding reasonable doubt has been used for years by district courts in Louisiana, and when objected to, its use has been affirmed on appeal. *State v. Cage*, 554 So.2d 39 (La. 1989); *State v. Messiah*, 538 So.2d 175 (La. 1988), *cert. den.*, ___ U.S. ___, 110 S.Ct. 880 (1990); *State v. Rault*, 445 So.2d 1203 (La. 1984); *cert. den.* 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); *State v. Taylor*, 410 So.2d 224 (La. 1982); *State v. Monroe*, 397 So.2d 1258 (La. 1981), *cert. den.*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed 1411 (1982); *State v. Stramiello*, 392 So.2d 425 (La. 1981); *State v. West*, 552 So.2d 478 (La. App. 4th Cir. 1989), *writ granted*, 560 So.2d 33 (1990); *State v. Washington*, 522 So.2d 628 (La. App. 4th Cir. 1988); *Bently v. State*, 523 So.2d 1321 (La. 1988), *cert. den.* 109 S.Ct. 94, 102 L.Ed. 70 (1988); *State v. Miller*, 489 So.2d 268 (La. App. 4th Cir. 1986), *writ den.*, 496 So.2d 1030 (La. 1986).

596 So.2d 177, at 185 (La. 1992). The Louisiana court affirmed petitioner's conviction and remanded for a new sentencing hearing.

SUMMARY OF ARGUMENT

Petitioner John Sullivan, facing capital murder charges, was entitled to be tried by a jury of his peers. He was entitled to have that jury decide the question of his guilt or innocence, and he was entitled to have the jury decide the question of his guilt or innocence based upon a burden-of-proof standard which required proof beyond a reasonable doubt in order to convict. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, error in charging a jury, including the error made in petitioner's case, may not reach the level of constitutional error because of other instructions in the jury charge. *Cupp v. Naughton*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

Sullivan was tried by a jury. The jury did decide the question of his guilt or innocence, and the burden-of-proof standard used was one which required the State of Louisiana to prove his guilt beyond a reasonable doubt.

Errors were made by the trial judge when he described the burden-of-proof standard to the jury. He

did, however, clearly charge the jurors that if they entertained a reasonable doubt about any fact or element necessary to constitute Sullivan's guilt, they should acquit Sullivan. He also charged them that even if they found that the evidence demonstrated a probability of guilt, yet if it did not establish guilt beyond a reasonable doubt, they should acquit Sullivan. The errors occurred when the judge described a reasonable doubt as being a serious doubt, a substantial doubt, one which would give rise to a grave uncertainty, and one which would make a juror feel that he had not an abiding conviction to a moral certainty of Sullivan's guilt. These errors introduced ambiguity into the jury charge on reasonable doubt. However, because the concept of "reasonable doubt" is clear as used and because the improperly used descriptive terms did not significantly detract from the essential meaning of the concept of reasonable doubt, the jury charge did not create a reasonable likelihood that the jury judged Sullivan's guilt or innocence based upon a burden-of-proof charge below that required by the Due Process Clause.

Although an earlier case in this Court, *Cage v. Louisiana*, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) condemned a similar charge because jurors "could have" been led to use the wrong burden-of-proof standard, the Court has since disapproved the *Cage* standard for evaluating ambiguous jury instructions and has stated that the proper standard is whether the errors created a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475 (1991), at 482 n. 4.

The errors in the jury charge were trial errors under the analytical framework of *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991).

Beyond a reasonable doubt, the errors complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

ARGUMENT

THE ERRORS COMMITTED BY THE TRIAL COURT IN DEFINING REASONABLE DOUBT DID NOT CONTRIBUTE TO THE VERDICT OBTAINED IN PETITIONER'S TRIAL.

A. The Standard used in *Cage v. Louisiana* for Evaluating an Ambiguous Jury Charge has been Disapproved and Superseded.

This Court has modified the criterion for judging ambiguous jury charges since *Cage v. Louisiana* was decided. The Court held in *Cage* that a reasonable juror *could have* interpreted the jury instruction given at Cage's trial to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. *Cage*, 111 S.Ct. 328, at 330 (La. 1990). Later, in *Estelle v. McGuire*, 112 S.Ct. 475 (1991), this Court disapproved the test used in *Cage* and established the "reasonable likelihood" standard as appropriate for review of ambiguous jury instructions:

> "[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has

applied the challenged instruction in a way' that violates the Constitution."

Id. at 482

The Court noted that language in *Cage* might be read as endorsing a different standard of review for jury instructions, and held that "we now disapprove the standard of review language in *Cage* and *Yates* [*v. Evatt*, 111 S.Ct. 1884], and reaffirm the standard set out in *Boyde* [*v. California*], 110 S.Ct. 1190 (1990)." *Estelle v. McGuire*, 112 S.Ct. 475 (1991), at 482 n. 4.

B. The Jury Charge on Reasonable Doubt in Petitioner's Trial is Subject to Harmless-Error Analysis.

The Louisiana Supreme Court assumed that the jury charge given at trial was erroneous because it was substantially similar to that given in *State v. Cage, supra*.[5] Thus, it viewed the question before it as "whether it

[5] The Louisiana Supreme Court decided *State v. Cage*, 583 So.2d 1125 (La. 1991), *cert. denied*, 502 U.S. ___, 112 S.Ct. 211, 116 L.Ed.2d 170 (1991), *supra*, on remand from this Court, using the criterion that the jury charge "could have" caused the jury to convict Cage through use of a burden-of-proof standard below that allowed by the Due Process Clause. *State v. Cage* was issued by the Louisiana court before this Court disapproved the "could have" criterion and adopted the "reasonable likelihood" test of *Estelle v. McGuire*, 112 S.Ct. 475, at 482 n. 4. The Louisiana high court in petitioner's case relied on *State v. Cage*, with its "could have" criterion, to conclude that the jury charge in petitioner's case was erroneous. *State v. Sullivan*, 596 So.2d 177, at 185 (La. 1992). Thus, the Louisiana Supreme Court has never evaluated the jury charge in petitioner's case using the appropriate criterion for determining whether the jury charge on reasonable doubt violated the Due Process Clause.

appears beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's finding of guilt." *State v. Sullivan*, 596 So.2d 177, at 185 (La. 1992). The court concluded that the instruction did not contribute to the jury's finding of guilt, citing its previous *State v. Cage* decision in which it applied the analytical framework of *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). *State v. Sullivan*, 596 So.2d at 185.

The *Fulminante* framework requires a reviewing court to classify errors as either trial errors, which are subject to harmless error analysis, or as structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and thus remain subject to automatic reversal. *Fulminante*, 111 S.Ct., at 1265 (opinion of Chief Justice Rehnquist). The Louisiana court in *State v. Cage* held that an error in the jury charge was a trial error. *State v. Cage*, 583 So.2d 1125, 1127-28. It presumably came to the same conclusion in Sullivan's case because it cited *Cage* as authority for its holding. *State v. Sullivan*, 596 So.2d at 185; J.App. 27.

The State does not suggest that every jury charge is subject to harmless-error analysis. Certainly not every jury charge pertaining to burden-of-proof is subject to harmless-error analysis. Some such errors do affect the reliability of the fact-finding process and the errors cannot be quantitatively assessed. The State suggests no more than that an examination of the particular errors in the case now before the court leads to the conclusion that the errors are subject to quantitative assessment and in this case they did not affect the reliability of the fact-finding process.

In this case the jury was instructed that it must evaluate the evidence using the reasonable-doubt standard.[6] The jury was not told to consider the evidence without any burden-of-proof standard.[7] The jury was told that it could not use a probability-of-guilt standard.[8]

The errors in the jury instructions in the case before this Court were communicative errors, the effects of which can be reasonably measured or, in *Fulminante* terms, quantitatively assessed. They were attempts to describe a necessary concept for the jury.

Petitioner's contention that no error in a reasonable doubt instruction can be subject to harmless error analysis if issues of fact are contested is contrary to both logic and experience. If, for instance, someone inserted the phrase "Reasonable doubt is like a bird singing on a window sill" into an otherwise adequate and complete jury charge on reasonable doubt, the phrase would render the jury charge erroneous because reasonable doubt is in fact not at all like a bird singing on a window sill. Nonetheless, the error in the charge would be harmless. While this specific example is improbable, it nonetheless

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[6] The trial court instructed the jury:

"If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. *Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.* . . .
. . . " (emphasis supplied) J.App. 2

[7] See: *Jackson v. Virginia*, 443 U.S. 307, at 320 n. 14.

[8] See: *In re Winship, supra*, 397 U.S. 358 (1970).

demonstrates that the categorical refusal to consider harmless any error in a reasonable doubt jury charge on the ground that it cannot be harmless, is simply wrong. Each error must be examined, or assessed.

This Court may conclude that the errors committed do not rise to the level of constitutional error, which is the only type of error in state proceedings with which the Court is concerned. If the Court concludes that the erroneous statements do constitute constitutional error, then the Court must assess that error to determine whether it contributed to the jury verdict.

This Court may examine constitutional error under the trial-error/structural-defect analysis of *Fulminante*, or it may analyze constitutional error as the minority opinion in *Fulminante* suggested, "by considering the nature of the right at issue and the effect of [the] error upon the trial." *Arizona v. Fulminante*, 111 S.Ct. 1246, at 1255. The State suggests that these approaches are not contradictory, and that under either analysis the errors committed in the jury instructions in petitioner Sullivan's case can and should be subjected to harmless-error analysis.

The jury instruction occurred during the trial. The majority opinion in *Fulminante* cited eighteen cases, beginning with *Chapman v. California*, which involved trial error – "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 111 S.Ct. at 1263-64. Five of the cases cited in this part of

the majority opinion concerned errors in jury instructions:

> "See, e.g., *Clemons v. Mississippi*, 494 U.S. ___, 110 S.Ct. 1441, 1450-51, 108 L.Ed.2d 725 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case);. . . . *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504, 107 S.Ct. 1918, 1921-1923, 95 L.Ed.2d 439 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption);. . . . *Kentucky v. Whorton*, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (failure to instruct the jury on the presumption of innocence);. . . . " *Id.* at 1263

In one of the cited cases, *Rose v. Clark*, the Court stated that, if a defendant was represented by counsel and was tried before an impartial adjudicator, any errors are strongly presumed to be subject to harmless error analysis. The Court reasoned that the central purpose of a criminal trial is to decide the factual questions of guilt or innocence and that, unless the errors affect the reliability of the fact-finding process, harmless error analysis should apply. *Rose v. Clark*, 478 U.S. at 577-78.

If this Court should conclude that the errors committed do rise to the level of constitutional error, the question then becomes whether error in the reasonable doubt jury instruction in petitioner's case affected the reliability

of the fact-finding process, so that harmless-error analysis cannot apply. Petitioner Sullivan suggests that an erroneous reasonable doubt instruction skews the framework of the trial and, thus, is a structural defect.

How shall an error committed during trial which, in theory, may have altered the basis on which the jury decided the case but in practice clearly had no effect on the outcome, be assessed? Does a reviewing court intrude into the jury's province of determining guilt or innocence by reviewing the evidence to determine whether the error was harmless? A majority of this Court answered these questions in *Rose v. Clark* by concluding that harmless error analysis, when applied to this type of trial error, does not impinge on the Sixth Amendment. The Court stated:

> "This question ['What is to be done about a trial error which, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?'] applies not merely to *Sandstrom* violations, but to other errors that may have affected *either the instructions the jury heard* or the record it considered – including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument – that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome. . . . logically implies that all such errors are immune

from harmless-error analysis. Yet this Court repeatedly has held to the contrary."

(citations omitted) (emphasis supplied)
Rose v. Clark, 478 U.S. 570, 582 n. 11, 106 S.Ct. 3101, 3108 n. 11 (1986).

The *Fulminante* majority analysis requires that an error be quantitatively assessable in order to be classified as a trial error. This does not mean, however, that the effect of the error must always be present in the record. In *Fulminante* the Court noted the following errors which, although the effects of the errors were omitted from the record, were nonetheless subject to harmless-error analysis:

" . . . *Crane v. Kentucky*, 476 U.S. 683, 691, 106 S.Ct. 2142, 2147, 90 L.Ed.2d 636 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (restriction on a defendant's right to cross examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U.S. 114, 117-118, and n. 2, 104 S.Ct. 453, 454-455, and n. 2, 78 L.Ed.2d 267 (1983) (denial of a defendants's right to be present at trial);. . . . *Coleman v. Alabama*, 399 U.S. 1, 10-11, 90 S.Ct. 1999, 2003-2004, 26 L.Ed.2d 3876 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause)."

Fulminante, 111 S.Ct. at 1263

Two factors may assist in evaluating whether the errors in jury instructions in this case are subject to

quantitative assessment. First, the jury instructions did not exclude any evidence from consideration by the jury, so that the evidence which the jury did consider can be quantitatively assessed. Second, the instructions did not exclude any issues from consideration by the jury. Thus, the Louisiana Supreme Court should have been able to reliably analyze the errors in order to determine whether they were harmless.

In *Yates v. Evatt*, 111 S.Ct. 1884 (1991), this Court applied harmless error analysis to an erroneous presumption of malice. The Court restated the *Chapman* test as "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* at 1892. The Court further stated:

"To say that an error did not contribute to the verdict is. . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

Id. at 1893

Such is an excellent description of the error in petitioner's case.

C. The Jury Charge on Reasonable Doubt Given in Sullivan's Trial Did Not Violate Sullivan's Right to Due Process of Law.

The State submits that the standard of review used in *Cage* and that now approved by *Estelle v. McGuire* are substantially different, and in petitioner Sullivan's case should lead to the conclusion that the jury instructions on

reasonable doubt given at his trial did not create a reasonable likelihood that the jury decided Sullivan's guilt using a burden-of-proof standard which violated his right to due process of law. Many events "could" occur which have no "reasonable likelihood" of occurring. Counsel "could" incidentally view the President on his walk to the Supreme Court Building for argument, but there is no "reasonable likelihood" that this will occur.

The State requests that this Court reevaluate the effect of the terms used in Sullivan's case which had been used in *Cage*, but in light of the *Estelle v. McGuire* criterion.

(1) *Reasonable Doubt*

The trial court charged the jury that if it entertained any reasonable doubt as to any fact or element necessary to constitute guilt, it should give Sullivan the benefit of that doubt and acquit him. The court also charged the jury that even if the evidence demonstrated a probability of guilt, if it did not establish guilt beyond a reasonable doubt the jury should acquit. J.App. 2.

The term "reasonable doubt" has clear meaning.[9] Attempts to define such a doubt, which have been

[9] See: *State v. Robinson*, 235 Or. 524, at 528, 385 P.2d 754 (1963) ("reasonable doubt" is a term so commonly known and understood that it requires no embellishment); *State of Oregon v. Mond*, 199 Or. 165, 193, 260 P.2d 474 (1953) (quoting *People v. Klein*, 305 Ill. 141, 137 N.E. 145 (1922)), that "[t]here is no more lucid definition of the term 'reasonable doubt' than the term itself"); *State v. Morey*, 25 Or. 241, at 257, 35 P. 655 (1894) (reasonable doubt is within the comprehension of every person capable

described in legal literature for over a century and a half, have failed.[10] However, the term is frequently used in popular literature, media, and art, as well as law, so that the concept is a familiar one. The term "beyond a reasonable doubt" has settled meaning. The State submits that those concepts used in the jury charge which were condemned in *Cage* did not detract from the commonly understood meaning of "reasonable doubt." They did not create a reasonable likelihood that the jury would be misled.

(2) *"Moral Certainty"*

The most ambiguous term used in the charge was "moral certainty." The jurors were instructed, in effect, that if they did not feel they had an abiding conviction to a moral certainty of Sullivan's guilt, then they had a reasonable doubt. This phrase has been used in criminal jury charges for over a century.[11] Although the term "moral certainty" was likely not helpful to the jury, its

of understanding common English and further definition cannot make it plainer).

[10] See, e.g., *United States v. Hall*, 854 F.2d 1036, 1037-39 (7th Cir 1988) (courts are strongly discouraged from attempting to define "reasonable doubt"); *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir.), *cert. den.* 112 S.Ct. 111, 116 L.Ed.2d 80 (1991) (trial court has discretion to define or not to define "reasonable doubt").

[11] It is usually traced back to Chief Justice Shaw's charge to the jury in *Commonwealth v. Webster*, 59 Mass (5 Cush) 295, 320 (1850). Chief Justice Shaw's charge has been the basis of the reasonable doubt instruction in many jurisdictions. McCormick, *Evidence* 963, Sec. 341 (3rd ed. 1984); Morano, "A Reexamination of the Development of the Reasonable Doubt Rule," 55 B.U.L.Rev. 507, 522-23 (1975).

use in the context of the instruction in the case before the Court was innocuous or, if anything, helpful to Sullivan.[12]

This Court held that a jury charge containing the admonition that "[p]roof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty. . . . " was "certainly very favorable to the accused, and is sustained by respectable authority." *Miles v. United States*, 103 U.S. 304, at 312 (1880).

(3) *"Grave Uncertainty," "Actual or Substantial Doubt," and "Serious Doubt."*

The trial court below did not use the term "grave doubt" which was used in *Cage*, but did describe a reasonable doubt as one giving rise to a "grave uncertainty." The trial judge used the phrases "grave uncertainty," "actual or substantial doubt," and "serious doubt" in the jury instruction to contrast with doubt based upon "mere

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[12] See, e.g., McBaine, "Burden of Proof: Degrees of Belief," 32 Cal. L. Rev. 242, 258-59 (1944) ("To use the phrase moral certainty may convey the idea to the jury that absolute certainty is required."); *Monk v. Zelez*, 901 F.2d at 890 (use of the term "moral certainty" could mitigate the impact of other wording in the instruction that might have lessened the state's burden of proof); *United States v. Smaldone*, 485 F.2d 1333, 1348 (10th Cir. 1973), *cert. den.* 416 U.S. 936, 94 S.Ct. 1934, 40 L.Ed.2d 286 (1974) (inclusion of the term "moral certainty" mitigated the impact of an otherwise suspect reasonable doubt instruction); *State v. Crenshaw*, 51 Ohio App.2d 63, 5 O.O.3d 181, 366 N.E.2d 84, 85 (1977) ("firmly convinced" is an appropriate, but lesser standard than convinced to a "moral certainty").

caprice, fancy or conjecture" or "mere possible doubt." J.App. 2-3.

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), decided eight years after *In re Winship*, this Court found that a jury instruction defining reasonable doubt as "a substantial doubt, a real doubt" was unclear, but declined to find it reversible error. *Id.* at 488. Some Federal circuit courts have also declined to find "substantial doubt" language to be reversible. *Murphy v. Holland*, 776 F.2d 470, 477 (4th Cir. 1985), vac. on other grounds, 475 U.S. 1138, 106 S.Ct. 1787 (1986); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir. 1987), *cert. den.* 484 U.S. 1059, 108 S.Ct. 1012, 98 L.Ed.2d 978 (1988).

The Louisiana Supreme Court had, until *Cage*, viewed the terms "serious doubt" and "grave uncertainty" as an accurate statement of the law when viewed in the context of the entire jury charge on reasonable doubt.[13]

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[13] In *State v. Stramiello*, 392 So.2d 425, 429 (La. 1980), the Louisiana Supreme Court found that an instruction using the phrase "grave uncertainty" in a reasonable doubt instruction was "neither erroneous nor prejudicial" when the charge was considered in its entirety. In *State v. Monroe*, 397 So.2d 1258, 1269 (La. 1981), *cert. denied*, 463 U.S. 1229 (1982), that court found that a trial judge's characterization of reasonable doubt as involving "serious doubt" and "grave uncertainty," when viewed in the context of the entire charge, was an "accurate statement of the law." In *State v. Taylor*, 410 So.2d 224 (La. 1982), the Louisiana Supreme Court concluded that the charge using the phrases "grave uncertainty" and "moral certainty" to define reasonable doubt could create some confusion, but was not reversible error. That court followed the *Taylor* reasoning in *State v. Messiah*, 538 So.2d 175, 184 n. 5 (La. 1988) *cert. denied*, 110 S.Ct. 880 (1990),

(4) *The Jury Instructions on Reasonable Doubt in Sullivan's Trial did not Create a Reasonable Likelihood that the Jury Decided Sullivan's Guilt Using a Burden-of-Proof Standard Which Violated Sullivan's Right to Due Process.*

This Court has clearly stated that the phrases and concepts involving "grave" doubt, "substantial" doubt, and "moral certainty," used in *Cage v. Louisiana*, should not again be used in jury charges on reasonable doubt. The Louisiana Supreme Court is "confident that a jury instruction like this one [in Sullivan's case] will not be used in future criminal proceedings." *State v. Sullivan*, 596 So.2d 177, at 186 n. 4. The State does not here seek reconsideration of the condemnation of the phrases. The State does submit that historic tolerance for the use of the condemned phrases by both state and federal courts militates against the conclusion that good faith use of the phrases by courts prior to *Cage* amounts to denial of due process of law.[14] Tolerance shown for the use of the phrases, the State submits, indicates less likelihood that the phrases detract from the commonly understood meaning of "reasonable doubt."

Other courts which have considered this issue have concluded, as did the majority of the Louisiana Supreme

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and in the direct appeal in *State v. Cage*, 554 So.2d 39, 41 (La. 1989).

[14] Improper jury instructions in state criminal trials may be undesirable, erroneous, or even universally condemned, without so infecting the entire trial that the resulting conviction violates due process. See: *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1737 (1977) (federal habeas corpus relief) (quoting *Cupp v. Naughten*, 414 U.S. 141, at 147, 94 S.Ct. 396, at 400 (1973).

Court, that an erroneous reasonable doubt jury instruction is subject to harmless error analysis.[15]

D. The Errors in the Jury Instructions on Reasonable Doubt in Petitioner's Trial were Harmless Beyond a Reasonable Doubt.

The State submits that the errors committed by the trial judge below do not rise to the level of constitutional error. If the Court concludes that the errors may or do constitute constitutional error, the Court should review the record in its entirety before reversing the conviction for error that may be harmless. *Arizona v. Fulminante*, 111 S.Ct. 1246, 1264 (1991); *Rose v. Clark*, 106 S.Ct. at 3106;

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[15] *See*: *State v. Dullivan*, 523 A.2d 1353, 1355-56 (Conn.App.Ct. 1987) (erroneous reasonable doubt instruction subject to harmless error analysis, but evidence not sufficiently strong to conclude that the erroneous instruction did not contribute to the verdict); *Commonwealth v. Garcia*, 399 N.E.2d 460, 471-73 (Mass. 1980) (subjecting erroneous reasonable doubt instruction to harmless error analysis and finding erroneous instruction harmless because of overwhelming evidence of defendant's guilt); *see also Lanigan v. Maloney*, 853 F.2d 40, 48-50 (1st Cir. 1988) (constitutionally defective reasonable doubt instruction is not automatically reversible, although only rarely will the court find the error harmless beyond a reasonable doubt), *cert. denied*, 488 U.S. 1007 (1989); *State v. Gilchrist*, 591 A.2d 131, 136-37 (Conn.App.Ct.1991) (erroneous instruction failed to state that the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense – subject to harmless error analysis, *appeal denied*, 593 A.2d 131 (Conn. 1991); *People v. Williams*, 558 N.E.2d 1258, 1267-68 (Ill.App.Ct. 1990) (erroneous instruction failed to state that the prosecution must prove beyond a reasonable doubt that the defendant was not insane – subject to harmless-error analysis).

United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1982). Respondent submits that the facts of this case, as set out in detail in the opinion of the Louisiana Supreme Court and as recounted in the Statement of the Case, *supra*, p. 2-5, demonstrate that the erroneous statements in the jury charge as to reasonable doubt given in petitioner's trial were harmless beyond all reasonable doubt. See: *State v. Sullivan*, supra, 596 So.2d 177 (1992), at 179-181, 186; J.App. 11-23.

CONCLUSION

Respondent respectfully requests that the judgment of the Louisiana Supreme Court affirming petitioner's conviction be affirmed.

Respectfully submitted,

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